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April 17, 1990

VIA HAND DELIVERY

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United States Environmental Protection Agency
Region VIII
999 18th Street
Denver, CO 80202-2405

Re: East Helena CERCLA Site - ARCO's Comments on EPA's Proposed Consent Decree

Dear Sandra:

This letter is to provide you with ARCO's initial response to EPA's proposed Consent Decree which was included in the Agency's February 23, 1990 Special Notice Letter to ARCO (the "Consent Decree" or "Decree"). As we indicated in our March 22, 1990 meeting with EPA, the State of Montana and ASARCO, ARCO does not believe that it should be considered a PRP for the Process Ponds Operable Unit at the East Helena CERCLA site (the "Site"). Until this matter is resolved, however, ARCO intends to participate fully in negotiations over the Consent Decree and the Work Plan. We are providing you with this letter to facilitate negotiations over the Consent Decree. As we discussed yesterday, I understand that a meeting to discuss the Consent Decree is tentatively scheduled for April 18, dependant upon Mike Goodstein's availability.

Our comments on the Consent Decree are set forth below:

A. GENERAL COMMENTS

The Consent Decree fails to address several provisions in Section 122 of CERCLA which were enacted in order to encourage settlement between potentially responsible parties ("PRPs") and the government. For example, the Consent Decree does not include a covenant not to sue. See Sections 122(c)(1) and Section 122(f) of CERCLA. A covenant not to sue clearly is appropriate under the circumstances of this Consent Decree, particularly for ARCO whose alleged liability is premised on theories of successor liability and an unquantified, unproven contribution to the Process Ponds.

The Consent Decree includes a determination that releases at the site may present an imminent and substantial endangerment, despite the express language in Section 122(d)(1)(A) of CERCLA which provides that,

> The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

See also Section 122(d)1)(B)("The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release constitutes an imminent and substantial endangerment to the public health, or welfare or the environment.") The imminent and substantial endangerment determination should be stricken from the Decree.

The Consent Decree also does not contain a contribution protection clause pursuant to Section 113(f) of CERCLA, nor does the Consent Decree sufficiently describe the matters addressed in the settlement for purposes of contribution protection. A clause should be inserted in the Decree which provides contribution protection to the settling defendants, as mandated by CERCLA.

The Decree contains several provisions which appear to give EPA a unilateral right to require defendants to implement additional work at the Site, subject in certain cases to the dispute resolution process. It is unreasonable to expect defendants in the context of an RD/RA consent decree essentially to sign a "blank check" for additional work, particularly where EPA has sole discretion to require the additional work. If additional work is required beyond that contemplated under the Consent Decree and the Work Plan, the Agency can reserve whatever rights it may have to require defendants to conduct such additional work, subject to the covenant not to sue provided for by Section 122 of CERCLA.

B. SPECIFIC COMMENTS

1. Page 3 - The second "Whereas" clause concerning an imminent and substantial endangerment is not required under Section 122(d) of CERCLA. See discussion above.

2. Pages 3 and 4 - The "Whereas" clause on the bottom of Page 3 and top of Page 4 apparently covers matters addressed in the settlement. This clause must be more explicit in order to provide contribution protection to settling defendants for all matters addressed in the settlement.

3. Page 6, Paragraph II.A.C. - This provision would require ARCO to carry out all actions required under the Consent Decree in the event ASARCO could not complete the work. ARCO does not believe this is appropriate given the scope of the Consent Decree and the nature and extent of ARCO's alleged contributions to the Process Ponds Operable Unit. Moreover, it may not be possible for ARCO to conduct certain of the remedial actions for the Process Ponds Operable Unit since the remedial actions involve ASARCO facilities and operations.

4. Page 7, Paragraph III.D. - The National Contingency Plan should be defined as the NCP promulgated and effective as of the date of the Consent Decree, i.e., the currently effective NCP set forth at 55 Fed. Reg. 8666 et seq. (March 8, 1990). In the event that changes to the NCP are promulgated after the effective date of the Consent Decree, the Parties should not be bound by such changes, but rather should negotiate in good faith whether to address such changes.

5. Page 10, Paragraph IV.C. - This paragraph states that if ARARs change during the course of work, the defendants shall be responsible for attaining any additional or more stringent ARARs. This provision directly contravenes the currently effective

NCP which provides that only those ARARs enacted or promulgated as of the date of the Record of Decision need be attained. See 40 C.F.R. §300.430(f)(1)(ii)(B); 55 Fed. Reg. 8757-8758. ARCO will need to carefully examine EPA's ARARs determinations for consistency with CERCLA Section 121(d) of CERCLA and the new NCP.

6. Page 10, Paragraph IV.D. - This paragraph requires defendants to achieve the more stringent of remediation levels specified in the ROD and in the Work Plan. As a threshold matter, any differences in Remediation Levels between the ROD and the Work Plan should be resolved prior to execution of the Consent Decree. Additionally, the requirement that is most appropriate based upon site specific circumstances should be attained, not necessarily the most stringent requirement.

7. Page 12, Paragraph V.C. - The defendants should have an opportunity to correct any deficiencies indicated by EPA in the revised document prior to accrual of stipulated penalties. Additionally, stipulated penalties for any alleged deficiencies should not begin to accrue until a determination is made in the Agency's favor following the conclusion of dispute resolution.

8. Page 12, Paragraph V.D. - ARCO does not have control over whether ASARCO commences on-site construction or cleanup activities or any work described as remedial action in the Work Plan. ARCO should not be subject to stipulated penalties in the event that ASARCO commences such work.

9. Page 13, Paragraph V.E. - This paragraph provides that remedial design obligations may be enforced by the United States retroactively. We are unclear as to the intent of this paragraph.

10. Page 14, Paragraph VI.A. - This paragraph requires that all work be conducted in accordance with EPA guidance. This paragraph also makes defendants responsible for identifying other guidelines, policies, procedures, etc., that may be appropriate for performing the work and for notifying EPA of such guidelines. While EPA guidance may be considered, ARCO does not believe that defendants should be required to conduct work under the Consent Decree in accordance with guidance documents, policies and procedures which have not been duly promulgated. Even assuming for purposes of discussion only that defendants are required to conduct work in accordance with guidance documents, such guidance documents would have to be final documents published and effective as of the date of the Record of Decision and identified in the Record of Decision. The defendants should not have the burden of identifying and then complying with the Agency's continually changing guidance. Additionally, the defendants should not be bound to conduct work in accordance with amendments to CERCLA and the NCP which occur during implementation of work.

11. Page 15, Paragraph VI.B. - This sentence should refer to all other "applicable" federal, state and local laws. The paragraph should be reworded to specify that permits are not required for on-site response actions in accordance with Section 121(e) of CERCLA. Additionally, failure to obtain a permit when

necessary steps to obtain the permit have been followed should not give rise to stipulated penalties, and must constitute a force majeure event.

12. Page 15, Paragraph VI.C - This provision, requiring defendants to "implement all mitigation measures identified by EPA through the consultation process" under 36 C.F.R. Part 800, (historical resources) is too broad.

13. Page 16, Paragraph VI.D. - This paragraph allows EPA to disapprove of the defendants' contractors, and provides that stipulated penalties shall accrue if EPA disapproves any resubmitted contractor. While consultation with the Agency may be appropriate in selecting contractors, the Agency should not be able to veto a contractor. In any case, stipulated penalties should not accrue if a contractor is vetoed.

14. Page 17-19, Paragraph VII.A. - Why does the Agency need monthly, weekly and daily progress reports?

15. Page 22, Paragraph VII.D. - This paragraph requires certification of reports by a responsible corporate officer. This paragraph goes far beyond that which is statutorily required and is unacceptable to ARCO, particularly since ARCO does not expect to actually supervise on-site response work.

16. Page 23, Paragraph VIII.D. - The EPA Project Coordinator has the authority to "initiate response actions." We suggest that this paragraph simply state that the EPA Project

Coordinator has the authority vested in the OSC and the Remedial Project Manager under the NCP.

17. Page 24, Paragraph IX.B. - The defendants' inability to obtain access should be considered a force majeure event.

18. Page 26, Paragraph IX.F. - This paragraph requires defendants to provide EPA with raw data. This provision should be consistent with EPA's obligations under the Consent Decree and provide that defendants only need to provide EPA with data that have been QA/QC'd and verified.

19. Page 32, Paragraph XI.A. - ARCO objects to the requirement that the defendants obtain insurance to protect the United States against all liability arising out of the acts or omissions of the defendants or the defendants' contractors. In any event, the insurance requirements are excessive. ARCO also objects to Paragraph XI.B. which gives EPA the unilateral right to increase insurance amounts.

20. Page 34, Paragraph XII.A. - This paragraph requires the defendants to maintain a "financial instrument sufficiently funded to perform the work, including operation and maintenance." ARCO objects to this requirement. A "financial instrument" should not be necessary for companies of ARCO's and ASARCO's financial stature.

27. Page 35, Paragraph XIII - Paragraph XIII.C. states that the cost summary shall contain the following: a copy of the

EPA SPUR Report and any additional summary information determined necessary by EPA to identify costs not included in the SPUR Reports. Under this paragraph, defendants expressly waive the right to request additional documentation. The limited information the Agency would provide under this paragraph is not sufficient for the defendants to evaluate EPA's costs.

28. Page 39, Paragraphs XIV.C-F. - These paragraphs provide for administrative record review in the dispute resolution context. EPA has the unilateral right to determine whether disputes are to be resolved on the administrative record. Defendants have the burden of demonstrating that EPA's position is arbitrary and capricious. ARCO objects to administrative record review, the arbitrary and capricious standard of review, and the placement of the burden of proof on the defendants in the dispute resolution context.

29. Pages 41-44, Section XV - This section addresses stipulated penalties. ARCO has the following concerns about this section: 1) The list of actions constituting "noncompliance" contains several items that clearly are not appropriate for triggering stipulated penalties (e.g., failure to achieve the remediation levels and violations (?) of ARARs); 2) the penalty amounts are excessive; 3) in the event of a dispute, stipulated penalties should not begin to accrue until the dispute is resolved; 4) administrative record review of stipulated penalty disputes, placement of the burden of proof on defendants, and the arbitrary and capricious standard of review are not appropriate; 5) the Consent Decree should provide that the Agency has the discretion

to waive or decrease the stipulated penalties set forth in the Decree; and 6) the "handling charge" and "six percent per annum penalty charge" are without basis in CERCLA and should be eliminated from the Decree.

30. Pages 44-46, Section XVI - This section addresses force majeure. Paragraph XVI.A. should define force majeure as an event arising from causes beyond the reasonable control of defendants and their contractors. Paragraph XVI.A. also should provide that force majeure does include failure to obtain necessary approvals or permits when defendants have made timely applications for such approvals, and failure to obtain access when the defendants have sought to obtain access in a timely manner. The 24 hour notification period in Paragraph XVI.B. is unrealistic. ARCO objects to administrative record review, the arbitrary and capricious standard of review, and the placement of the burden of proof on defendants in disputes over whether a delay was attributable to force majeure.

31. Page 49, Section XVIII - The provision requiring defendants to waive any evidentiary objections to data is too broad. Additionally, ARCO should not be required to waive its evidentiary objections to data gathered by EPA or ASARCO in the RI/FS process since ARCO did not have an opportunity to participate in the RI/FS process.

32. Pages 50-51, Section XX - This section addresses the 5-year review requirement in Section 121(c) of CERCLA. The five-year review requirement should mirror the statutory language.

Additionally, Paragraph XX.B. appears to provide the Agency with a unilateral right to require that the defendants implement additional work if the Agency determines that "additional work is necessary to meet Remediation Levels or is otherwise necessary to fulfill the objectives of this Decree." It is unclear how this additional work language relates to the five-year review requirement under Section 121(c) of CERCLA, or to Sections XXI and XXII of the Consent Decree. Given the ambiguity of Paragraph XX.B., and that Paragraph XX.B. may provide the Agency with a unilateral right to require additional work, ARCO objects to this paragraph.

33. Pages 51 and 52, Paragraph XXI.C. - This paragraph provides that if EPA determines that an amendment to the ROD is warranted, EPA may require the defendants to halt or modify the work to provide for a public comment period and an amendment to the ROD. EPA will determine whether a ROD amendment and/or a schedule change is necessary and what modifications in the work or schedules are necessary. These EPA determinations shall not be subject to dispute resolution. Paragraph XXI.C. can be construed to: 1) provide EPA with the right to unilaterally modify the work required under the Consent Decree or change the schedules (under which defendants are subject to stipulated penalties); and 2) require that defendants implement the modified work under the changed schedules, without even the benefit of dispute resolution. If this is EPA's intent, ARCO objects to Paragraph XXI.C. In any case, the language in Paragraph XXI.C. must be clarified.

34. Pages 52-55, Section XXII - This section provides EPA with a unilateral right to require the defendants to implement additional work if EPA determines that a modification or amendment of the Work Plan is necessary to meet Remediation Levels specified in the ROD. If this is EPA's intent, ARCO objects to Section XXII. Additionally, EPA's determination of the necessity for implementation of a contingency remedy must be subject to dispute resolution.

35. Page 57, Section XXV - This section concerning certification of completion also provides that defendants shall undertake additional work determined by EPA to be necessary under Section XXII. As noted above, ARCO objects to EPA's unilateral right to require additional work, particularly if the failure to conduct additional work is subject to stipulated penalties as indicated in Section XXV.

36. Pages 60-61, Paragraphs XXVII.F, H, I, and J. - These paragraphs essentially reserve the rights of EPA and the United States to take actions against the defendants. Instead of these provisions, the Consent Decree should include a covenant not to sue as provided for under Section 122 of CERCLA.

The comments above are not intended to be ARCO's response to EPA's Special Notice Letter, nor do these comments constitute ARCO's paragraph by paragraph response to the Consent Decree as part of a good-faith offer. ARCO may provide additional comments on the Consent Decree during negotiations.

We look forward to meeting with you on April 18th to discuss the Consent Decree, if Mike Goodstein is available. Please don't hesitate to call if you have any questions concerning these comments prior to that time.

Sincerely,

PARCEL, MAURO, HULTIN & SPAANSTRA, P.C.

Robert W. Lawrence

RWL:jb

cc: Michael Goodstein, Esq.
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